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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 115

CARROLL DUNSCOMBE,
Petitioner,

vs.

BESSIE F. SAYLE, AS EXECUTRIX OF ESTATE OF HAROLD C. SAYLE, DECEASED,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1138

CARROLL DUNSCOMBE,
Petitioner,

vs.

BESSIE F. SAYLE, AS EXECUTRIX OF ESTATE OF HAROLD C. SAYLE, DECEASED,
Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Petitioner was the plaintiff below. The Respondent was the Defendant below. Throughout this brief the Petitioner will be described as Petitioner and the Respondent will be described as Respondent. Italics are supplied except as otherwise noted.

The real history of this case is long and complex, involving numerous suits and appeals in both the Florida and Federal courts. For a full and complete understanding of the circumstances out of which the present case arose, the Respondent respectfully suggests that the Court refer to the Chronological Account attached to and made a part of a

Motion filed by the Respondent in the United States Court of Appeals for the Fifth Circuit, a certified copy of which has been filed by the Respondent with this Court under Rule 21(6), Revised Rules of the Supreme Court of the United States (1954), as an additional portion of the Record.

The instant suit was filed in the United States District Court for the Southern District of Florida on March 25, 1964, by the Petitioner.[1] The District Court determined that it had no jurisdiction over the cause, and, on its own motion, dismissed the Complaint without prejudice on March 26, 1964 (R. 27). Petitioner's Motion to Vacate the Order of Dismissal was denied by the District Court on April 21, 1964 (R. 28).

The Petitioner appealed from the Order of Dismissal of the United States District Court to the United States Court of Appeals for the Fifth Circuit (R. 31). On January 4, 1965, after hearing argument, the Court of Appeals affirmed the Order of Dismissal (R. 42), and on January 13, 1965, entered the following judgment (R. 43):

> "PER CURIAM: As announced from the bench, this appeal is DISMISSED. It is patently a frivolous appeal. Double costs are awarded the appellee as authorized by 28 U.S.C. § 1912."

Petition for re-hearing was denied by Order entered February 9, 1965 (R. 72). Petitioner now seeks to have this Court review the aforesaid Judgment and Order of the United States Court of Appeals for the Fifth Circuit.

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1. He also, as attorney, filed a similar suit for his wife and the wife's suit was handled the same way by the District Court as was done in the within suit. The wife, unlike her husband, the Petitioner, did not appeal. Also, following the dismissal by the District Court of both cases, Dunscombe and his wife filed suits in the Florida State Courts. (See Chronological Account.) Both of these suits were dismissed with prejudice by the Florida Circuit Court on September 1, 1964. (Final Judgment Book 3, at page 366, Public Records of Martin County, Florida.) Appeals to the Florida Supreme Court were dismissed for lack of jurisdiction on February 3, 1965. *Dunscombe* v. *Sayle*, 173 So.2d 145 (1965).

QUESTIONS PRESENTED FOR REVIEW

Petitioner states four issues which he conceives to be raised by this appeal. Petitioner's phrasing of these issues is complex and redundant. In the interest of brevity, Respondent suggests that the real issues herein are as follows:

I.

Whether the United States District Court Had the Authority, on Its Own Motion, to Dismiss the Petitioner's Complaint Without Prejudice for Lack of Jurisdiction?

II.

Whether the United States Court of Appeals for the Fifth Circuit Had the Authority to Assess Double Costs Against the Petitioner for the Taking of a Patently Frivolous Appeal?

The argument in this brief is directed to all points raised in this petition, regardless of which statement of the issues is adopted.

ARGUMENT

I.

The United States District Court Had the Authority, on Its Own Motion, to Dismiss Petitioner's Complaint for Lack of Jurisdiction.

In his allegation of jurisdiction the Petitioner's complaint stated (R. 1):

> "This Court has jurisdiction of the parties and subject matter of this action under the Fifth and Fourteenth Amendments of the United States Constitution in that Plaintiff was tried and convicted of a felony

with which he was never charged and his property taken without due process of law, by the Florida Court and officials thereof."

The record affirmatively shows both parties to be residents of Martin County in the Southern District of Florida, therefore, it is obvious this is a non-diversity case.

In granting original jurisdiction to the United States District Courts in non-diversity cases, Congress provided in 28 U.S.C. § 1331(a) that:

> "The district courts shall have original jurisdiction of all civil actions *wherein the matter in controversy exceeds the sum or value* of $10,000.00 exclusive of interest and costs, *and arises under the Constitution, laws, or treaties of the United States.*"

It was under this statutory provision that the Petitioner Dunscombe sought to invoke the jurisdiction of the United States District Court for the Southern District of Florida.

A United States District Court is a court of limited jurisdiction and the cases over which it has cognizance are specifically limited. Its jurisdiction must be made apparent by affirmative allegations at the time that it is sought to be invoked, 1 Moore, Federal Practice, p. 630. The long recognized presumption is that the district court is without jurisdiction over a cause unless the contrary affirmatively appears from the record. *Birmingham Post Co.* v. *Brown*, 217 F.2d 127, 130 (5th Cir. 1954).

In the *Birmingham Post* case, it was held that no matter how the issue of the district court's jurisdiction may be raised, "whether by motion, by answer, *or upon the court's own initiative*, the burden of proving all jurisdictional facts rests upon the plaintiff or the person asserting that the court has jurisdiction;" and, it concluded: "The question of jurisdiction is self-asserting in every case. It arises even though

the litigants are silent. Even their consent cannot authorize cognizance if fundamental grounds of jurisdiction are absent." *Ibid.*

Thus, even though the court's jurisdiction may be unchallenged, the court may raise the issue on its own motion and dismiss the case. 1 Moore, Federal Practice, pp. 609-610. This in fact is the court's duty, it being obligated to raise the issue on its own motion, *sua sponte*, unless otherwise presented. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 59 S. Ct. 744 (1939).

When an amount in controversy is required in order to establish jurisdiction, a complaint filed in the district court is defective unless it contains a proper allegation as to the controverted sum. Such was the situation in *Canadian Indemnity Co.* v. *Republic Indemnity Co.*, 222 F.2d 601 (9th Cir. 1955), wherein the complaint alleged diversity of citizenship yet failed to allege any amount in controversy. *On its own motion*, the Court of Appeals dismissed the case for want of showing of the amount required to be in controversy.

The necessity of alleging that the matter in controversy is in excess of a certain given sum is clear when a complainant seeks to invoke the original jurisdiction of the district court. In Petitioner's complaint, no mention of the required amount in controversy was included as is so clearly required by 28 U.S.C. §1331. The Petitioner's complaint therefore, was defective in this regard, and this defect may properly be raised "by motion or in the responsive pleading; it may be raised for the first time at the appellate stage by either of the parties; *it may be raised by the trial and appellate courts on their own motion.*" Moore, Manual of Federal Practice and Procedure, p. 256 (1962).

There was still another defect in Petitioner's jurisdictional statement—its failure to allege a federal question.

Petitioner says his Constitutional rights were violated by the Florida Court and officials thereof "in that Petitioner was tried and convicted of a felony with which he was never charged and his property taken without due process of law."

In essence, the Petitioner attempted by this allegation to create a federal question. In this, we submit, he was not successful. The difficulty in stating a claim arising under the Constitution, treaties, and laws of the United States is not in setting forth an allegation of general federal question jurisdiction as the Petitioner attempted to do, but rather in following it up with a claim which "arises under the Constitution, laws, or treaties of the United States." 1 Bender, Federal Practice Forms, p. 121, at note 4 (1963). For federal question jurisdiction to be well founded, a right or immunity created by the Constitution or laws of the United States must appear as an essential element of the complaint. The action, furthermore, must revolve upon the federal issue, it not being sufficient if the federal question merely lurks in the background. *Gully* v. *First National Bank*, 299 U.S. 109, 117, 57 S. Ct. 96, 100 (1936). Furthermore, the claim based on that federal issue must not be frivolous or sham, made solely for the purpose of gaining jurisdiction. *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776 (1946); *Agnew* v. *City of Compton*, 239 F.2d 226 (10th Cir. 1956), cert. den. 353 U.S. 959, 77 S. Ct. 868.

Under 28 U.S.C. § 1331, the general federal question statute, a sum in excess of $10,000.00 is clearly required in order for the jurisdiction of the United States District Court to attach. In coming to this Court, however, the Petitioner has belatedly attempted to circumvent this requirement by framing his federal question as arising under 42 U.S.C. § 1981 and § 1983, the Civil Rights Act of 1870. We respectfully submit that the Petitioner has failed in this attempt.

In *Agnew* v. *City of Compton*, 239 F.2d 226 (1956) cert. den. 353 U.S. 959, 77 S. Ct. 868, the Court of Appeals for the 10th Circuit stated that "the plain purpose of these statutes is to provide for equality of rights between persons of different races." *Id.* at p. 230. Where the complaint fails to allege that a person was deprived of any right which under similar circumstances would have been accorded a person of a different race, it fails to state a claim arising under these sections. *Ibid.*

The complaint in the *Agnew* case (*supra*) alleged that Agnew was arrested without a warrant by two policemen who entered Agnew's premises, arrested him, seized some of his property, and transported him to jail in a police vehicle. The complaint further alleged that the acts complained of were committed wrongfully, maliciously, and while acting under cover of the police power of the City and that these acts were part of a conspiracy to deprive Agnew of federal rights secured by the Constitution of the United States and federal statutes. *Id.* at pp. 228-229. In considering the complaint, the Court concluded that it failed to state a claim arising under the Civil Rights Act of 1870 "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons." *Id.* at p. 231. As to Agnew's allegation that he had been denied his rights, privileges, and immunities under the United States Constitution, the Court stated that "general allegations of this kind, when unsupported by the complaint, read as a whole, have consistently been rejected as insufficient." *Ibid.* citing numerous cases at note 11.

Petitioner, in his long bout of litigation with Respondent's testator was no stranger to the District Court for the Southern District of Florida.[2] Nor could Petitioner's jousts

2. See Chronological Account, showing that chapter one of such bout had its debut in that District Court.

with the Florida Appellate Courts be unknown to that District Court in view of the somewhat staggering list of reported unsuccessful appeals of record.

A mere superficial knowledge of this record of appeals by the District Court would have convinced even the most patient Judge that Dunscombe had long since had "his day in Court" and was perilously close to obstructing justice by mis-use of the judicial processes. It was totally apparent that the jurisdictional statement was a sham. Being under the duty to examine its own jurisdiction before proceeding, the District Court discerned that the claim presented by the Petitioner in this case was obviously frivolous and made solely for the purpose of gaining jurisdiction. The District Court, faced with the sham statement of a federal question, a statement which in addition alleged no jurisdictional amount, was entirely correct in dismissing, on its own motion, yet another attempt by this Petitioner to re-hash and re-litigate matters long since decided adversely to him by many courts of competent jurisdiction.

II.

The United States Court of Appeals for the Fifth Circuit Had the Authority to Assess Double Costs Against the Petitioner for His Taking of a Patently Frivolous Appeal.

When an appeal is founded upon a federal question which is totally insubstantial and frivolous, this Court has held that either a judgment of affirmance or an order of dismissal is justified. The allowance of the one or the granting of the other as a practical question has the same effect. The federal question upon which the Court's jurisdiction depends is also the identical question upon which the merits depend, the two questions thus being coterminous. *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 33 S. Ct. 80 (1912).

Upon finding the Petitioner's appeal to be a patently frivolous one, the Court of Appeals dismissed the appeal and awarded double costs to the Respondent pursuant to the authority of 28 U.S.C. § 1912. The Petitioner contends, however, that the Court of Appeals lacked the authority to award double costs since it *dismissed* the appeal rather than *affirming* the judgment of the District Court.

As stated by Mr. Chief Justice White in the *Deming case* (*supra*):

> "The inquiry, then, narrows itself to this: Does the power to award the damages for delay which the statute confers in cases of affirmance give the authority to exert the power where, in form, there is no judgment of affirmance, but only an order of dismissal? To say that the duty to impose the statutory damage in such a case did not exist would require us to hold that things which were one and the same must be held to be different, and that the statute did not extend to and include that which in substance it embraced, because, by adhering blindly to mere form of words, the statute might be treated as not extending to an authority embraced within its spirit and purpose. . . . Indeed, the subject is further aptly illustrated by directing attention to the fact that it is not questioned that the power here obtains to direct the imposition of the penalty if the result of our conclusion that the Federal ground was frivolous be followed by an affirmance instead of an order of dismissal. Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case."

Since it is clear that the Petitioner's appeal was patently frivolous, the Court of Appeals had the authority under 28 U.S.C. § 1912 to award double costs to the Respondent.

CONCLUSION

Confronted with a sham statement of a federal question and a failure to allege the requisite jurisdictional amount, the District Court, acting on its own motion, correctly dismissed yet another attempt by this Petitioner to re-hash and re-litigate matters long since decided adversely to him by many courts of competent jurisdiction

Upon consideration of Petitioner's appeal, the Court of Appeals correctly determined that it was patently frivolous. Its judgment dismissing the appeal and awarding double costs to Respondent was entirely correct and proper. Wherefore, Respondent prays that this Honorable Court dismiss this petition for writ of certiorari.

Respectfully submitted,

s/C. Robert Burns

C. ROBERT BURNS,

Attorney for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Brief for Respondent has been furnished by mail to JOHN WATTAWA, ESQ., 1317 F. St., N.W., Washington, D.C., Attorney for Petitioner, this 4th day of June, 1965.

s/C. Robert Burns

Attorney